United States Department of Labor
Employees' Compensation Appeals Board

F.B., Appellant	)	
and	)	**Docket No. 19-0683**
	)	**Issued: September 11, 2019**
DEPARTMENT OF VETERANS AFFAIRS, MICHAEL E. DEBAKEY VETERANS ADMINISTRATION MEDICAL CENTER, Houston, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On February 7, 2019 appellant filed a timely appeal from September 20, 2018 and January 31, 2019 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the January 31, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish an injury in the performance of duty on July 31, 2018, as alleged.

FACTUAL HISTORY

On August 3, 2018 appellant, then a 51-year-old lead medical supply technician, filed a traumatic injury claim (Form CA-1) alleging that on July 31, 2018 he was cut on his right arm by a coworker, following continuing harassment by this individual, while in the performance of duty. He did not initially stop work. On the reverse side of the claim form, the employing establishment indicated that appellant was not in the performance of duty when injured because he violated the "stay away letter" in place against his coworker. It also referenced a stay away letter and pending investigation.

The employing establishment issued an undated authorization for examination and/treatment (Form CA-16) to an occupational health physician.

In a development letter dated August 13, 2018, OWCP advised appellant of the deficiencies of his claim, and informed him of the factual and medical evidence needed to establish his claim. It provided a questionnaire for his completion. Specifically, OWCP requested information regarding the incident and the nature of appellant's relationship with the assailant. It afforded him 30 days to submit the necessary evidence.

In a report dated July 31, 2018, Dr. Asmi Trivedi, an internal medicine specialist, related that appellant had an altercation with an "ex significant other," and she cut him on the right arm with a box cutter. He indicated an impression of superficial cut.

In a report dated August 3, 2018, Dr. Hossam Safar, a Board-certified internist, diagnosed laceration without foreign body of right forearm. He noted that the laceration was the result of an assault by a coworker with a box cutter. Dr. Safar indicated that appellant could return to work on August 3, 2018.

OWCP also received an August 10, 2018 duty status report (Form CA-17) from a physician assistant which noted a date of injury as July 31, 2018 and described findings of a mild cut on the right forearm.

In a narrative statement dated August 11, 2018, appellant indicated that on July 31, 2018 he was cut with a box cutter by a coworker while working and was "admitted to the emergency room" at the employing establishment medical facility on that date. He noted that, since being released from the hospital, he had not been able to sleep, had anxiety attacks, and had thoughts of being attacked at any moment. Appellant related that he was diagnosed with post-traumatic stress disorder (PTSD) and it seemed to have been aggravated because of the cut to his arm.

In a victim information sheet dated August 13, 2018, appellant noted that he scheduled a mental health appointment, and, due to the incident, he experienced insomnia, anxiety, embarrassment at work, PTSD, and fear that the perpetrator was stalking his home.

In an investigatory report dated August 13, 2018, appellant indicated that he was the subject of an unprovoked attack at work and suffered two slashes to his right arm. In an employee emergency treatment form of even date, Dr. Trivedi, an internal medicine specialist, indicated that appellant sustained an "on-job-injury" when he was cut by a box cutter on his right arm.

By decision dated September 20, 2018, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish that the injury arose during the course of employment and "within the scope of compensable work factors."

On October 10, 2018 appellant requested a review of the written record by OWCP's Branch of Hearings and Review.

In a report dated August 17, 2018, Rhonda London, a psychiatric nurse practitioner, indicated that she examined appellant who complained of increased anxiety and stress secondary to work. She noted an impression of PTSD.

By decision dated January 31, 2019, an OWCP hearing representative affirmed OWCP's initial September 20, 2018 decision finding that the evidence of record failed to establish that appellant's alleged injury occurred within the performance of duty.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

The phrase sustained while in the performance of duty is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of employment.[5] In the course of employment relates to the elements of time, place, and work activity.[6] To arise in the course of employment, an injury must occur at a time when the employee may reasonably be stated to be engaged in his or her master's business, at a place when he or she may reasonably be expected to be in connection with his or her employment, and while he or she was reasonably fulfilling the duties of the employment, or engaged in doing something incidental thereto.[7] As to the phrase in the course of employment, the Board has accepted the

[3] *Supra* note 1.

[4] *J.W.*, Docket No. 18-0183 (issued January 4, 2019); *L.R.*, Docket No. 17-0031 (issued July 11, 2017).

[5] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *J.W.*, *id.*; *Bernard D. Blum*, 1 ECAB 1 (1947).

[6] *J.G.*, Docket No. 17-0747 (issued May 14, 2018).

[7] *J.W.*, *supra* note 4; *see J.B.*, Docket No. 17-0378 (issued December 22, 2017).

general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to and from work, before or after work hours or at lunch time, are compensable.[8]

Assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work or if the reason for the assault was a quarrel having its origin in the work. Assaults for private reasons do not arise out of the employment unless, by facilitating an assault that would not otherwise be made, the employment becomes a contributing factor.[9]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty on July 31, 2018, as alleged.

In its August 13, 2018 development letter, OWCP requested further information regarding the incident and the nature of appellant's relationship with the assailant. However, appellant did not respond to the specific inquiries regarding the factual circumstances surrounding the employment incident.[10] His failure to respond to these specific questions included on the development letter prevented OWCP from determining whether the incident arose from his employment or for a "private reason" a personal dispute imported into the work environment.

In his July 31, 2018 report, Dr. Trivedi noted that appellant reported an altercation with an ex significant other while at work. However, as noted above, appellant did not respond to OWCP's August 13, 2018 development letter requesting additional information regarding the relationship between appellant and assailant. Larson provides that assaults arise "out of the employment" either if the risk of assault is increased because of the nature or setting of the work, or if the reason for the assault was a quarrel having its origin in the work. Assaults for private reasons do not arise out of the employment unless, by facilitating an assault that, would not otherwise be made, the employment becomes a contributing factor.[11] Because appellant failed to indicate the nature of his relationship with the assailant as well as the reasons for the assault, the Board finds that his injury did not occur within the performance of duty.[12]

[8] *T.H.*, Docket No. 17-0747 (issued May 14, 2018).

[9] *J.G., supra* note 6; *see also* A. Larson, *The Law of Workers' Compensation* § 8.00 (May 2004).

[10] *D.A.*, Docket No. 18-1715 (issued May 24, 2019); *see David S. Lee*, 56 ECAB 602 (2005).

[11] A. Larson, *The Law of Workers' Compensation*, *supra* note 9. *See J.W.*, *supra* note 4; *M.A.*, Docket No. 08-2510 (issued July 16, 2009).

[12] The Board notes that the employing establishment issued a signed authorization for examination and/or treatment (Form CA-16) authorizing medical treatment. The Board has held that where an employing establishment properly executes a CA-16 form, which authorizes medical treatment as a result of an employee's claim for an employment-related injury, it creates a contractual obligation which does not involve the employee directly to pay the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. §§ 10.300 and 10.304; *see also R.W.*, Docket No. 18-0894 (issued December 4, 2018).

For the foregoing reasons, the Board finds that appellant has not met his burden of proof to establish that the claimed incident occurred as alleged, nor has he met his burden of proof to establish that he sustained a traumatic injury in the performance of duty. As appellant did not establish that his alleged injury occurred in the performance of duty, the Board need not consider the medical evidence of record.[13]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this decision regarding the merits of appellant's claim, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty on July 31, 2018, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2019 and September 20, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 11, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

[13] *D.A., supra* note 10; *see Katherine A. Berg*, 54 ECAB 262 (2002).